

**DECISION**

11586 *Fitzgerald*  
*Proc I*  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

FILE: B-193610

DATE: October 4, 1979

## MATTER OF:

Cardion Electronics, A Division  
of General Signal Corporation

## DIGEST:

*[Protest of Bid Rejection as Nonresponsive]*

1. Subgrantee is not required to open negotiations with complainant under formally advertised procurement to make bid responsive.
2. Subgrantee should not only reject complainant's offer as nonresponsive but that of other bidder as well, since award to other bidder requires subgrantee to waive, after bid opening, material deviation in bid contrary to Federal norm.

*DLG-1752*  
Cardion Electronics, a Division of General Signal Corporation (Cardion), filed a complaint against the award of a contract by Chautauqua County, New York (county), to Motorola Communication and Electronics, Inc. (Motorola), for a microwave communications systems.

*DLG-029477*  
*DLG-02948*  
*ABC 187*  
The procurement is being funded under a Law Enforcement Assistance Administration (LEAA) grant awarded to the State of New York Division of Criminal Justice Services (DCJS) under the authority of 42 U.S.C. § 3731, et seq. (1976). The county is a subgrantee. Upon evaluating Cardion's proposal, the county held that the proposal did not comply with some of the material requirements of the specifications. It then rejected the Cardion proposal as nonresponsive. Cardion, however, contends that if its proposal was not in compliance with all material requirements, then neither was Motorola's. It believes that either negotiations should be conducted to permit meaningful discussions of deficiencies or, in the alternative, both allegedly nonconforming proposals should be rejected.

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For the reasons indicated below, we find that Cardion's bid was properly rejected, but that Motorola's bid should also have been rejected.

In its evaluation of the Cardion proposal, the county found a number of deficiencies, including the following:

Cardion did not provide, as required by the specifications, that the equipment would have the capability of automatic reversion to 12-volt DC battery operation upon failure of the primary and standby AC power sources but only offered this capability as an option;

Cardion took exception to the time allowed by the solicitation for responding to repair service calls and refused to accept any penalty charges for failing to provide service within a specified time period;

Cardion did not state that it would accept responsibility for complete system maintenance but only accepted responsibility for part of the microwave system;

Cardion proposed to install and maintain its equipment with no responsibility for the lines of interconnection to two-way radio equipment and control consoles, the antennas, or the transmission lines.

Based on the foregoing, the county concluded that, even though Cardion's proposed price was less than Motorola's, its proposal was nonresponsive.

In rebutting the county's position, Cardion argues in part:

While conceding that it took exception to the solicitation's service response time and penalty provisions, Cardion notes that Motorola did too and that while the county indicated a willingness to negotiate with Motorola on this matter, it refused to negotiate with Cardion;

As to accepting responsibility for complete system maintenance, Cardion states that its proposal did accept this responsibility except for six specific modifications and that any confusion over maintenance responsibility is due to ambiguities in the solicitation;

Cardion denies that it refused responsibility for maintenance of the interconnections to two-way radio equipment and control consoles and claims that it is due to ambiguities in the solicitation that it failed to offer to install and maintain the microwave antennas and transmission lines.

Our Office will consider complaints concerning contracts under Federal grants, but our review of such complaints is limited to determining whether there has been compliance with applicable statutory requirements, agency regulations and grant terms. Union Carbide Corporation, 56 Comp. Gen. 487 (1977), 77-1 CPD 243. ✓  
LEAA states, and Cardion agrees, that under Office of Management and Budget Circular A-102, Attachment O, ✓  
the grantee may use its own procurement regulations which reflect applicable State and local law, rules and regulations so long as the procurement adheres to certain minimum Federal standards. Yet, neither LEAA, DCJS, nor the county has cited any State or local law or precedent applicable to this matter. We note, however, that the State of New York does have a public

policy which favors the use of advertised bidding for the procurement of goods and services for its political subdivisions. See N.Y. GEN. MUN. LAW § 103 (McKinney).

LEAA does mention that <sup>ch. 3, para. 2d</sup> chapter 3, page 10, 2d, of its Grantee Management Procurement Manual (M1700.6) provides that any bid which deviates in any way from the procurement's essential requirements is to be rejected. In light of this, LEAA notes that both DCJS and the county found that the Cardion proposal deviated from the essential requirements of the procurement while Motorola's did not. LEAA also claims that minimum Federal procurement requirements have been met in this case. Consequently, LEAA believes that, under the circumstances, the award to Motorola appears to be fair, rational and reasonable and should not be disturbed.

The parties to this protest seem to disagree as to whether this was a formally advertised procurement or a negotiated one. LEAA, DCJS, and the county all indicate that the solicitation requested the submission of sealed bids while Cardion indicates that it believed that it was offering a proposal which would form the basis for future negotiations between itself and the county. We believe that this procurement was intended to be an invitation for bids (formal advertising) rather than a request for proposals (negotiations). We reach this conclusion based on the solicitation's "NOTICE AND INSTRUCTIONS TO BIDDERS." Although some of the language used in this section could be construed as intending a negotiated procurement, it appears that a formally advertised procurement was actually intended since, for example, a date, time, and place was set for a formal bid opening. This would also be in accord with the New York State policy, mentioned above, favoring the use of formally advertised bidding by the State's political subdivisions.

Because no one has cited any State or local law or regulation that is controlling in this matter, we shall apply the Federal norm. See, e.g., Mallott & Peterson-Grundy Contractors; Vibra Whirl and Company, B-191887, January 2, 1979, 79-1 CPD 3. As noted above, we are dealing with a formally advertised procurement. Thus, the concept of "responsiveness" is applicable here. For a bid to be responsive under a Federal procurement, it must "offer to perform, without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions thereof." 49 Comp. Gen. 553, 556 (1970). In this connection, Federal Procurement Regulations (FPR) § 1-2.404-2(a) (1964 ed. amend. 121) provides that any bid which fails to conform to an essential requirement of the solicitation, such as the specifications, is to be rejected as nonresponsive. As indicated earlier, this rule is also found in the LEAA Grantee Management Procurement Manual.

Here, Cardion has admitted that its offer does not totally conform to the specifications. It contends, however, that the deficiencies in question are due to ambiguous specifications. But Cardion never filed a complaint against these allegedly ambiguous specifications prior to bid opening because it believed that it was involved in a negotiated procurement which would allow it to correct any deficiencies in its offer. However, this misconception does not excuse Cardion. In view of Cardion's admission that in some respects its proposal fails to conform with the specifications, the county's rejection of that proposal as nonresponsive must be deemed proper.

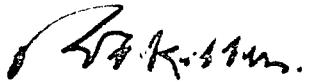
However, Cardion has also argued that if its proposal was nonresponsive so was Motorola's. We agree. The county's evaluation of Motorola's proposal found that Motorola took exception to the solicitation's

repair service response time and the penalties to be charged for failure to make the repairs within the time specified. Nevertheless, the evaluation sheet indicates that the county intended to negotiate with Motorola concerning this deficiency in order to permit its correction. But it is a fundamental precept of Federal procurement practice that all bidders must compete on an equal basis. See Cohu, Inc., 57 Comp. Gen. 759 (1978), 78-2 CPD 175; Union Carbide Corporation, supra. In addition, a bid must either comply with the material requirements of the solicitation at the time of bid opening or be rejected as nonresponsive. FPR § 1-2.404-2(a); see also Blazer Industries, Inc., B-194188, June 19, 1979, 79-1 CPD 440. Thus, not only can it be argued that Cardion was treated unequally in this matter, but, more importantly, the county in effect waived a material deviation in Motorola's bid. Consequently, we believe that Motorola's bid also should have been rejected as nonresponsive.

We recommend, therefore, that LEAA consider the feasibility of requiring the county to resolicit its requirement in light of the findings of this decision. Cf. Thomas Construction Company, Inc., et al., 55 Comp. Gen. 139 (1975), 75-2 CPD 101; Penske Detroit Diesel Allison, B-190658, May 16, 1978, 78-1 CPD 373.

By separate letter of today, we are informing the Administrator, LEAA, of our recommendation.

The complaint is denied in part and sustained in part.

  
Deputy Comptroller General  
of the United States